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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1310

CHARLES A. ESSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Citation to the Opinion Below	1
Jurisdiction	2
Questions Presented	2-3
Constitutional Provision Involved	3
Statute Involved	4
Statement of the Case	4-12
Reasons for Granting the Writ	12-24
Conclusion	25
Appendix "A" (Opinion of the Court of Appeals)	
Appendix "B" (Order of the Court of Appeals Denying Rehearing and Suggestion for Rehearing in Banc)	
Appendix "C" (Indictment Involved)	

TABLE OF AUTHORITIES.

Cases.

Beard v. United States, 222 F. 2d 84 (4th Cir. 1955)	15, 22
Gleckman v. United States, 80 F. 2d 394 (8th Cir. 1935)	20
Holland v. United States, 348 U. S. 121, 99 L. Ed. 150, 75 S. Ct. 127 (1954)	12, 20, 21, 23, 25
Kirsch v. United States, 174 F. 2d 595 (8th Cir. 1949)	20, 21
Leland v. State of Oregon, 343 U. S. 790, 72 S. Ct. 1002 (1952)	20
Lilienthal's Tobacco v. United States, 97 U. S. 237, 24 L. Ed. 901 (1877)	20
United States v. Doyle, 234 F. 2d 788 (7th Cir. 1956)	22
United States v. Charles A. Esser, 520 F. 2d 213 (1975)	Appendix "A"

United States v. Fenwick, 177 F. 2d 488, 492 (7th Cir. 1949) 20
United States v. Indian Trailer Corporation, 226 F. 2d 595 (7th Cir. 1955) 20
United States v. Lacob, 416 F. 2d 756 (7th Cir. 1969) ... 18, 22
United States v. Morse, 491 F. 2d 149 (1st Cir. 1974) 13, 18, 24
United States v. Slutsky, 487 F. 2d 832 (2nd Cir. 1973) 13, 14, 15, 18, 22, 24
Universal Camera Corp. v. N. L. R. B., 340 U. S. 475, 95 L. Ed. 456, 71 S. Ct. 456 (1951) 23

Constitutional Provisions.

Amendment V, Constitution of the United States 3

Statutes.

Title 28, United States Code, Section 1254(1) 2
Title 26, United States Code, Section 7201 4

Other Authority.

Handbook for Special Agents, Intelligence Division, Internal Revenue Manual, Chapter 9900 ..... 15, 16, 17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in *United States* v. *Charles A. Esser,* Case No. 74-1997, on August 12, 1975. A Petition for Rehearing and Suggestion for Rehearing In Banc were denied by that Court on February 12, 1976.

CITATION TO THE OPINION BELOW.

The Opinion of the United States Court of Appeals for the Seventh Circuit has been reported in 520 F. 2d 213 (1975) and is reproduced in Appendix "A" hereof. The Order of the United States Court of Appeals for the Seventh Circuit denying a rehearing and suggestion for rehearing in banc is unpublished and is reproduced in Appendix "B" hereof.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit having been entered on August 12, 1975, and the Petition for Rehearing and Suggestion for Rehearing In Banc having been denied on February 12, 1976, the jurisdiction of this Honorable Court is hereby invoked under Title 28, United States Code, Section 1254(1). The instant Petition shall be filed within thirty days after February 12, 1976, in accordance with Rule 22 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. In a federal criminal tax evasion case prosecuted exclusively under the bank deposits theory, must the government prove, as an element of its burden of establishing the guilt of the accused, that it has conducted an adequate and full investigation, examination and analysis of defendant's bank deposits in order:

   a. to distinguish between income and non-income deposits and to thus guarantee essential accuracy in the circumstantial proof;

   b. to make every reasonable effort to obtain such documentary evidence of defendant's bank deposits, including the deposit slips and underlying items of deposit, as is necessary to distinguish between income and non-income deposits; and

   c. to afford defendant the opportunity to explain deposits which the government cannot identify as income or non-income?

2. When the government does not conduct an adequate and full investigation and analysis of defendant's bank deposits, but instead claims that it was virtually impossible to do so, is it consistent with due process under the bank deposits theory of

analysis to allow a jury which has never received any instruction from the District Court on these matters:

   a. to determine whether defendant's deposits, including deposit slips and underlying items of deposit, were capable of retrieval, examination and analysis by the government; and

   b. to rely upon defendant's unanalyzed monthly bank statements and savings passbooks as proof of deposits of income?

3. When the government does not conduct an adequate and full investigation and analysis of defendant's bank deposits, but instead relies solely upon defendant's monthly bank statements and savings passbooks as proof of defendant's bank deposits, is it consistent with due process under the bank deposits theory of analysis to shift the burden of proof to defendant by requiring him to explain any discrepancy between the total deposits shown on his bank statements and the income reported on his tax return or suffer the legal inference that such discrepancy is unreported income?

CONSTITUTIONAL PROVISION INVOLVED.

The Due Process Clause of the Fifth Amendment to the Constitution of the United States is involved herein. Amendment V to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE INVOLVED.

The statute under which petitioner was charged and convicted is Title 26, United States Code, Section 7201. Said statute provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both, together with the costs of prosecution. (Aug. 16, 1954, c. 736, 68A Stat. 851.)

STATEMENT OF THE CASE.

The case was commenced on November 30, 1973, with the filing of a three-count indictment in the United States District Court for the Northern District of Illinois, Eastern Division, charging the petitioner with willfully and knowingly attempting to evade income taxes due for the years 1967, 1968 and 1969, by filing false income tax returns, in violation of Title 26, United States Code, Section 7201. The indictment involved is reproduced in Appendix "C" hereof. Petitioner was tried by a jury and convicted on all counts. His conviction was affirmed by the United States Court of Appeals for the Seventh Circuit.

Petitioner was prosecuted exclusively under the bank deposits theory of analysis. Throughout the trial and appeal petitioner argued that the government was required but had failed to prove, as an element of its burden of establishing his guilt, that it had conducted an adequate and full investigation, examination and analysis of petitioner's bank deposits. Petitioner contended that the government had failed to make any reasonable effort to examine, analyze and introduce into evidence petitioner's deposit slips and underlying items of deposit. Petitioner argued that the government had thus failed to properly attempt to distinguish income from non-income deposits and had thus failed to accord petitioner any opportunity to explain his unidentified non-income deposits. Petitioner concluded that these cumulative failures on the part of the government denied him a fair trial.

The government claimed at trial and on appeal, notwithstanding substantial evidence to the contrary, that it was virtually impossible to examine, analyze, reproduce and introduce into evidence petitioner's bank deposits. The government, therefore, merely obtained from petitioner, and introduced into evidence, his monthly bank statements and savings passbooks, without making any attempt to ascertain whether the deposits were income or non-income. The government's actual analysis of the *deposits* to petitioner's bank accounts consisted of simply adding up the credits on his monthly bank statements and savings passbooks. (Appendix, page A6, footnote 2.)

The government also contended on appeal that its investigation of petitioner's deposits was legally sufficient because petitioner had stated to the Internal Revenue Service that he deposited his business receipts into his bank accounts and because the monthly bank statements from his business checking account showed regular deposits having the appearance of business receipts. Contrary to this contention, however, the record is clear that petitioner *never* told the Internal Revenue Service that he *only* deposited business receipts into his bank accounts. It is clear from the record that during the years in question petitioner, a self-employed veterinarian, maintained only one active checking account which was titled, Prospect Animal Hospital, and that he used that account for non-business as well as business purposes.

Petitioner argued that the "appearance of income" rationale urged by the government was inapposite and could not legally suffice as a substitute for the fundamental requirement that in a bank deposits case an adequate and full investigation of the de-

posits must be conducted in order to distinguish between income and non-income deposits, in order to afford the accused an opportunity to explain deposits which the government cannot identify as income or non-income, and in order to guarantee essential accuracy in the circumstantial proof.

The Court of Appeals decided that the government's claim that it was virtually impossible to retrieve, examine and analyze petitioner's deposits was a question of fact for the jury. Although the Court recognized that "deposit slips and underlying items of deposit are customarily introduced to demonstrate the nature of the deposits" (Appendix, page A5), it concluded, based upon petitioner's statement that he deposited business receipts into his bank accounts, that the "bank statements introduced into evidence . . . showed regular deposits having the appearance of business receipts." (Appendix, page A7). The Court held that the authorities do not require the government to identify and analyze a defendant's bank deposits in order to prosecute under the bank deposits theory. The government must only prove that a defendant "was engaged in an income producing business and that regular deposits of funds having the appearance of income were in fact made to bank accounts during the course of business." (Appendix, page A5.) Once the government proves deposits having the appearance of income, "defendant has the burden to explain as far as possible the deposits. With this done the jury is entitled to infer that the difference between the balance of deposited items and reported income constitutes unreported income." (Appendix, page A6.)

The Court of Appeals concluded that a "full investigation of various transactions underlying defendant's deposits was conducted and that all reasonable steps were taken to identify and deduct non-income items such as inter-bank transfers and repayment of loans." (Appendix, pages A6-A7.) The Court also stated that the record was "replete with testimony regarding the determination and crediting of non-income items to the total deposits." (Appendix, page A7.) The trial record belies

these conclusions. The few non-income items which the government identified and deducted were not discovered by a full investigation and analysis of the transactions underlying petitioner's deposits, but were readily determined in the following cursory manner.

The government observed from the face of the savings passbooks which petitioner demonstrated to the IRS agents, that in 1967 at one savings and loan association petitioner effectuated four intra-bank transactions: a transfer of $1046.18 from one account to another, a transfer of $15,000 from a regular savings account to a savings certificate account, a renewal of said $15,000 savings certificate account, and a transfer of $5186.40 from a savings account which petitioner closed to another savings account. (Tr. 269-272.) The government deducted these intra-bank transfers as non-income.

The government was told by petitioner that he held two mortgages and that he received monthly payments which he deposited to his bank accounts. Petitioner also supplied the government with the names of the mortgagors and the government contacted them to confirm the existence of the mortgages. Without analyzing petitioner's deposits, the government deducted these mortgage loan repayments as non-income. (Tr. 571-573.)

The government determined from the face of petitioner's income tax returns that petitioner received non-business income, including proceeds from the sale of stock and commodities, rents, royalties, dividends and interest. Without analyzing petitioner's deposits, the government deducted these items as non-income.

The record is replete with testimony regarding the government's total failure to investigate and analyze petitioner's bank deposits. It is impossible to determine how many other non-income items could have been eliminated had the government actually analyzed the bank deposits.

The following facts, supported by transcript citations, bear importantly on the questions presented herein. Although the key government witnesses, the special agent who conducted the

criminal investigation and the revenue agent who testified as the government's summary witness, both knew that the bank deposits theory requires an analysis of the deposits (Tr. 232, 498), neither ever attempted to analyze the deposits made to petitioner's bank accounts. (Tr. 230-232, 499.) The special agent admitted that he did not even *attempt* to reproduce bank microfilm records of petitioner's deposits. (Tr. 213.) He admitted that the microfilm records of the bank where petitioner maintained his only active checking account were available (Tr. 230), but the deposit tickets "could not be produced without going into a time-consuming operation" (Tr. 229) and *he was told* that it would be virtually impossible. (Tr. 229.) Although he admitted that the deposits themselves, including the deposit slips and the underlying items of deposit, are the primary method of proof in a deposits case (Tr. 232), he testified that during his more than two-year investigation of petitioner the only things he investigated were the records furnished him by petitioner. (Tr. 231.)

The assistant cashier of the bank where petitioner maintained his only active checking account testified that the bank maintains a microfilm record of deposits and that the record is available. (Tr. 253.) He testified that his bank was not asked, and did not attempt, to locate any individual deposits to petitioner's account for any of the three years in question. (Tr. 256.) He admitted that, though it might be a tedious job, the vast majority of the deposits could be reconstructed from the microfilm. (Tr. 256-257.)

The president of a savings and loan association, where petitioner maintained a savings account, testified that the original source of the funds deposited to petitioner's account could have been ascertained by locating the deposit items on the microfilm records of his association; however, the government did not ask him to do that. (Tr. 283-284.)

After the trial commenced, the attorney for the government instructed three IRS special agents to examine microfilm records

at the bank where petitioner maintained his checking account (Tr. 395, 432, 449) and to obtain five designated deposit tickets and the corresponding checks deposited to petitioner's checking account. The first special agent testified that he attempted to locate the deposit tickets and checks on two dates in 1967 (Tr. 395-396) and he was able to obtain one deposit ticket and between 220 and 240 checks comprising the majority of the deposit made on that date. (Tr. 399-400.) He could not find the second deposit but admitted that it was not posted on petitioner's monthly bank statement on the same line as the date of the deposit he had attempted to locate. (Tr. 411-412.) The second agent testified that he had attempted to locate the deposit tickets and checks on two dates in 1968 (Tr. 432-433) and he was able to obtain one deposit ticket and 79 checks comprising a majority of the deposits made on that date. He could not find the second deposit but admitted that it was not posted on petitioner's monthly bank statement on the same line as the date of the deposit he had attempted to locate. (Tr. 441.) The third agent testified that he attempted to locate a deposit ticket and checks on one date in 1969 and he was unable to find a deposit ticket for that date but he did locate 48 checks deposited to petitioner's account on that date. (Tr. 449-452.)

Evidence adduced at trial from both government and defense witnesses established that during the years in question petitioner had a substantial cash accumulation from which he made substantial cash gifts and loans to relatives (Tr. 368-376, 760-763), friends (Tr. 310-317, 826-831) and business acquaintances. (Tr. 815-821.) These gifts, loans and the repayment of same are summarized as follows:

Witness	Transcript	Type	Gifts and Loans 1966	1967	1968	1969	Repayments 1967	1968	1969
Patricia Blosser	312-313	L	$5,000						
	313	R					$ 5,000 (A)		
	313-314	L		$ 6,000					
	313-314	R					6,000 (B)		
	315-316	L		3,000					
	315-316	R					3,000 (B)		
	316-317	L		5,000					
	316-317	R					5,000 (B)		
Emily Jacobson	368-369	G			$50,000				
	375	R							$ 5,000 (B)
	375	G			7,000				
	376	R						7,000 (B)	
Yvonne Koester	760	L			23,000				
	763	R*						1,400*(B)	1,680*(B)
Wendell Sampson	817	L		17,000					
	818	R					17,000 (B)		
	819	L		4,500					
	819	R						4,500 (B)	
Freda Kucera	826-827	L			$ 6,000				
	828	R						6,000 (B)	
	829-830	L			15,000				
	829-830	R						15,000 (B)	
	830-831	L				$6,000			
	830-831	R							6,000 (B)
			5,000	$35,000	$101,000	$6,000	$36,000	$33,900	$12,680

Type: L—Loan G—Gift R—Repayment

*Loan Repayment at $140 per month
10 months in 1968 $140x10=$1,400
12 months in 1969 $140x12=$1,680

(A) Loan repayment credited to petitioner in government summary chart as non-income deposit

(B) Loan repayments *not* credited to petitioner as non-income deposits

Concerning the foregoing gifts, loans and repayments, the government's summary witness testified that he credited petitioner with a non-income loan repayment of $5,000 from Patricia Blosser in January, 1967, because he assumed that "those funds may have been redeposited to the accounts. . . ." (Tr. 572.) He testified, however, that he treated Blosser's testimony about other cash loans she received from, and repaid to, petitioner in 1967 differently. (Tr. 573.) He stated that he had no way of knowing the source of these loans (Tr. 573), but "the money . . . could have come from Dr. Esser's cash accumulation. . . ." (Tr. 573.) He admitted that all funds accumulated by petitioner prior to 1967 and deposited in his bank accounts in 1967, 1968 or 1969 would not be taxable income during the years in question (Tr. 642-643), but the government's summary would have treated such amounts as taxable income. (Tr. 643.)

The government's summary of the evidence presented during its case-in-chief admittedly did not credit petitioner with additional non-income loan repayments totalling $14,000 from Blosser in 1967 (Tr. 655), $7,000 in non-income gift repayments from Emily Jacobson in 1968 (Tr. 656-658), and $5,000 in non-income repayments from her in 1969. (Tr. 659-660.) The government did not re-summarize the evidence at the close of the defense case and, accordingly, did not credit petitioner with additional non-income loan repayments totalling $17,000 from Wendell Sampson in 1967 (Tr. 818), $4,500 from Sampson in 1968 (Tr. 819), $21,000 from Freda Kucera in 1968 (Tr. 828-830), $1,400 from Yvonne Koester in 1968 (Tr. 763), $6,000 from Kucera in 1969 (Tr. 830-831), and $1,680 from Koester in 1969. (Tr. 763.)

Petitioner's business manager testified that most of petitioner's clients *paid by check* as opposed to cash. (Tr. 754.) She testified that several times a day petitioner cashed checks for his clients from funds he had in his wallet. (Tr. 755.) Petitioner cashed employees' payroll checks (Tr. 757) and travelers' checks (Tr. 759-760) in the same manner. (Tr. 757.) All such

checks were then put in the cash box (Tr. 756) and became part of petitioner's bank deposits. (Tr. 757.) Several times a week petitioner also gave her an additional hundred or two hundred dollars from his wallet and told her to put it in with the deposit. (Tr. 757-758.) She never saw petitioner cash a check from the cash business receipts in the cash box. (Tr. 756.) The government's summary witness had previously testified that all client checks, employee payroll checks and travelers' checks cashed by petitioner and subsequently deposited to his bank accounts would have appeared in the government's summary as taxable income to petitioner. (Tr. 622-637.)

Notwithstanding all of the foregoing, the Court of Appeals determined that "the evidence was more than sufficient to support the verdict below." (Appendix, page A7.)

REASONS FOR GRANTING THE WRIT.

The requirement that in a bank deposits case the government prove, as an element of its burden of establishing the guilt of the defendant, that it has made an adequate and full investigation of the deposits to defendant's bank accounts emanates from the decision of this Honorable Court in *Holland* v. *United States*, 348 U. S. 121, 99 L. Ed. 150, 75 S. Ct. 127 (1954). Although *Holland* was prosecuted under the net worth theory, the bank deposits theory is fraught with similar dangers for the accused. As Mr. Justice Clark recognized in 348 U. S. at 127-128:

> There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows.

In a bank deposits case there exists the similar danger that the jury might erroneously assume that once the government establishes a discrepancy between defendant's total bank deposits and reported income, the crime of tax evasion has been proved.

To alleviate this peril several of the circuits have defined the proof which the government must adduce in a criminal case prosecuted exclusively under the bank deposits theory.

The requirements for proceeding under the bank deposits theory were recently reviewed in *United States* v. *Morse*, 491 F. 2d 149 (1st Cir. 1974), in which the Court stated at page 152:

> In order to legitimately avail itself of this approach, the government must initially introduce evidence to show (1) that, during the tax years in question, the taxpayer was engaged in an income producing business or calling; (2) that he made regular deposits of funds into bank accounts; and (3) *that an adequate and full investigation of those accounts was conducted in order to distinguish between income and non-income deposits.* (Emphasis added.)

The investigatory procedures italicized above have also been mandated in other circuits. In *United States* v. *Slutsky*, 487 F. 2d 832 (2nd Cir. 1973), the Court stated at page 840:

> The requirement of a full and adequate investigation in a bank deposits case is based on the similar requirement in a net worth case. *Holland* v. *United States, supra.* Such investigation must establish a guarantee of essential accuracy in the circumstantial proof at trial as an element of the government's burden of proving guilt beyond reasonable doubt.

The Court then proceeded to extensively examine the adequacy of the government's investigation and analysis of *Slutsky's* deposits. Because the analysis in *Slutsky* is in such sharp contrast with the absence of any analysis in the case at bar, the bank deposits analysis in *Slutsky* merits detailed scrutiny. With respect to each of *Slutsky's* six bank accounts, hereinafter numbered 1 through 6, the Court stated in 487 F. 2d at 840-841:

> 1. With the exception of two unidentified items totalling some $2,000, every item of the total $1,661,639.08 deposited in this account during the three taxable years was analyzed. More than $1.5 million was identified as non-income. The remainder was charged as income.

2. Of the total $1,710,083.34 deposited in this account, more than $550,000 was identified as income. . . . That figure comprised 788 individual items of which 678 were items under $1,000. The IRS' investigation of this account entailed an analysis of every item over $1,000 (with the exception of approximately $11,000), and a random analysis of items under $1,000. Only $13,456.78 of the total deposits was identified and eliminated as non-income.
3. In this, the major business account, more than $13 million was deposited during the three years in question. Of the items over $1,000, the IRS analyzed all but $4,000. In addition, of the items under $1,000 (all of which had a number encircled on the back of the checks), some 769 were randomly analyzed. The result was the elimination of almost $3.8 million as non-income, the identification of over $800,000 as income, and the further charging as income of almost $7.5 million in unidentified items under $1,000. Some $1 million in currency deposited in this account was also charged as income.
4. Of the total $996,297.82 deposited in this account, every item was identified. $19,500 was eliminated as non-income. The remainder was charged as income.
5. Of the total $326,687.75 deposited in this account, every item was identified. More than $230,000 was eliminated as non-income. The remainder was charged as income.
6. Of the total $360,929.44 deposited in this account, every item was identified. More than $170,000 was eliminated as non-income. The remainder was charged as income.

In response to *Slutsky's* complaint that the government did not analyze every deposit item under $1,000, the Court concluded in 487 F. 2d at 842:

> [T]he investigation included a detailed check of every item in an amount greater than $1,000, with very few specified exceptions. In addition, a random check of 1447 items in amounts less than $1,000 was made; and the analyzed items were found to constitute income in virtually every instance. Moreover, a further examination of the business accounts disclosed that almost every item in an amount under $1,000 was reflected by a check with a room number encircled on the back; according to the record, this specifically identified these items as guest receipts and therefore income. To hold the government to a stricter duty of investigation than it performed here would be to ignore both the "reasonableness" and "fairness" strictures that have been imposed; it would also result in an exercise in diminishing returns in terms both of the provision of relevant information to the fact-finder and of the protection of the rights of taxpayers.

In *Beard* v. *United States*, 222 F. 2d 84 (4th Cir. 1955), the government's extensive analysis of defendant's bank deposits was described at page 91:

> The evidence was offered in the following manner: Microfilm copies of the checks made by the Bank by the Recordak process in the usual course of business. . . . They comprised 950 reels of microfilm, each containing reproductions in miniature of approximately 1500 checks. From the microfilm the Government made enlarged photographs of 854 checks cashed or deposited in 1944 . . . by Beard or his wife, and bearing the signature of one or the other as last endorser. These items were listed on a 19 page document which contained as to each check the date, the bank on which it was drawn, the drawer, the payee and the amount; and it also contained figures by which it could be identified as one of the items in the microfilm. It was prepared by ten revenue agents. . . .

In obvious recognition of the legal requirement that an adequate and full investigation of the deposits must be made in order for the government to prosecute under the bank deposits theory, the *Handbook for Special Agents, Intelligence Division, Internal Revenue Manual*, Chapter 9900, published by the Internal Revenue Service, promulgates the investigative requisites for a bank deposits case in section 326.4(2):

> The Government must establish that the deposits reflect income which is current. This may be accomplished by

showing that the taxpayer was engaged in an income-producing business, that he made periodic deposits to his bank account, *that the deposits have been analyzed to eliminate nonincome items such as loans or gifts, and income items which may be duplications of amounts actually accounted for and reported or, amounts which have been earned in prior years.* (Emphasis added.)

Section 326.6(4) is even more cogent:

> *The analysis of deposits is the vital part of a bank deposits case and too much importance cannot be placed upon its accuracy.* Exhibit 300-6 is illustrative of a schedule which may be used to show the results of this analysis. (Emphasis added.)

Exhibit 300-6, hereinafter reproduced, conclusively demonstrates that a deposits case contemplates a day-by-day analysis of every deposit in order to exclude non-income items and attempt to identify the source of the deposit items.

EXHIBIT 300-6

Handbook Reference: Subsection 326.6

ANALYSIS OF DEPOSITS TO CHECKING ACCOUNT

John and Mary Roe
First National Bank of Dayton, Ohio

Date	Total Deposit	Gross Receipts Deposited			Loans, Transfers, etc.	Report Exhibit No.	Source
		Currency	Checks Identified	Checks Unidentified			
1967							
1-3	$ 2,400	$ 100					Unidentified
					$ 1,600	6	Loan—Doc's Market
			$ 500			7	Sale to Elk's Club
			$ 100			8	Sale to John Smith
				$ 100			Unidentified
1-4	$ 1,200	$ 400					Unidentified
			$ 800			9	Sale to Frank Lee
1-5	$ 10,500	$ 200					Unidentified
					$10,000	10	Inheritance
			$ 300			11	Sale to John Smith
1-6	$ 3,750				$ 3,750	12	U. S. Savings Bonds Redeemed
Bal. of Year	$145,165	$40,300	$72,300	$28,765	$ 3,800		
Total	$163,015	$41,000	$74,000	$28,865	$19,150		

In the instant case, *United States* v. *Esser*, 520 F. 2d 213 (1975), the Seventh Circuit indicated its reliance upon *United States* v. *Morse*, 491 F. 2d 149 (1st Cir. 1974), and *United States* v. *Slutsky*, 487 F. 2d 832 (2nd Cir. 1973) (Appendix, page A5), but utterly disregarded or eliminated the third foundation requirement delineated by the First Circuit in *Morse* and followed by the Second Circuit in *Slutsky:*

> that an adequate and full investigation of those accounts was conducted in order to distinguish between income and non-income deposits. 491 F. 2d at 152.

Instead of requiring the government to fully investigate and analyze petitioner's bank deposits in order to distinguish between income and non-income deposits, the Seventh Circuit allowed the jury, which had never received any instruction from the District Court on this matter, to determine whether the government was or was not capable of retrieving and analyzing defendant's deposits. The Court stated in 520 F. 2d at 216-217 (Appendix, page A5):

> The government introduced the bank statements and passbooks as the most reliable evidence available. Though appellant attempted on cross-examination to establish that the slips and items were capable of retrieval, the question was left as one of fact for the jury.

The Seventh Circuit then ruled that a prosecution under the bank deposits theory does not require an analysis of the bank deposit items. The Court stated in 520 F. 2d at 217 (Appendix, page A5):

> [T]he bank deposits theory requires the government to prove that the defendant was engaged in an income producing business and that regular deposits of funds having the appearance of income were in fact made to bank accounts during the course of business. *United States* v. *Lacob*, 416 F. 2d 756 (7th Cir. 1969); *United States* v. *Stein*, 437 F.2d 775 (7th Cir. 1971); *United States* v. *Morse*, 491 F.2d 149 (1st Cir. 1974). The total deposits figure serves as the starting point for further analysis of the taxpayer's accounts.
>
> * * * * *

> After the government proves that deposits having the appearance of income were made the defendant has the burden to explain as far as possible the deposits. With this done the jury is entitled to infer that the difference between the balance of deposited items and reported income constitutes unreported income.

It is clear from the *Esser* opinion that the jury was free to rely upon the unanalyzed monthly bank statements and savings passbooks as proof of deposits of income, so long as the petitioner was engaged in an income producing business and that regular deposits, having the appearance of income, were made to his bank accounts. The Seventh Circuit then shifts the burden to petitioner to explain his deposits by attempting to distinguish income from non-income deposits from literally hundreds of unanalyzed entries in the deposits column on his monthly bank statements and savings passbooks which, at the time of trial, are five, six and seven years old. The petitioner thus had the burden of attempting to prove his innocence by doing exactly what the government claimed it could not, and therefore did not, do: conduct an investigation and analysis of his bank deposits, including his deposit tickets and clearing checks which exist only on the microfilm records at his banks, in order to distinguish between income and non-income deposits. If the petitioner fails to meet this burden, the Seventh Circuit indulges the inference that the discrepancy between the total deposits shown on the bank statements and the income reported on his tax returns is unreported income.

Petitioner respectfully suggests that the Seventh Circuit seriously misinterpreted the law and effectively deprived him of due process, first, by disregarding or eliminating the legal requirement that in a bank deposits case the government must prove, as an element of its burden of establishing the guilt of the defendant, that it has made an adequate and full investigation of the deposits to defendant's bank accounts; second, by shifting the burden of proof from the government to the defendant; and

third, by indulging the legal inference that if the defendant fails to explain the discrepancy between the total deposits shown on his monthly bank statements and his reported income, the difference is unreported income. While these errors of law are individually significant, their cumulative effect demonstrates an extraordinary deprivation of the fundamental fairness guaranteed a defendant in a criminal case.

It is elemental that the law never imposes a higher burden on a defendant in a criminal case than the burden of proof imposed upon the government. The burden of proof in a criminal case never shifts. *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237, 24 L. Ed 901 (1877); *Leland* v. *State of Oregon*, 343 U. S. 790, 72 S. Ct. 1002 (1952); *United States* v. *Fenwick*, 177 F. 2d 488, 492 (7th Cir. 1949); and *United States* v. *Indian Trailer Corporation*, 226 F. 2d 595, 598 (7th Cir. 1955). Accordingly, the conclusion seems inescapable that when the government proceeds exclusively under the bank deposits theory but does not analyze defendant's bank deposits, the law cannot constitutionally impose upon defendant the burden of explaining his deposits or, failing to do so, suffer the inference that the difference between the total of the items in the deposits column on his monthly bank statements and his reported income is unreported income. The bare fact that a man has deposited sums of money in a bank does not prove that he owed income tax on those amounts. *Kirsch* v. *United States*, 174 F. 2d 595, 601 (8th Cir. 1949); and *Gleckman* v. *United States*, 80 F. 2d 394, 399 (8th Cir. 1935).

The *Esser* rationale represents a significant transgression from Mr. Justice Clark's reasoning in *Holland* v. *United States, supra,* in 348 U. S. at 126:

> One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy. The application of such an assumption raises serious legal problems in the administration of the criminal law. Unlike civil actions . . . the prosecution must always prove the criminal charge beyond a reasonable doubt.

And in 348 U. S. at 128:

> Although it may sound fair to say that the taxpayer can explain the "bulge" in his net worth, he may be entirely honest and yet unable to recount his financial history. In addition, *such a rule would tend to shift the burden of proof*. Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Government's case by showing loose business methods or losing the jury through his apparent evasiveness. Of course, in other criminal prosecutions juries may disbelieve and convict the innocent. But the courts must minimize this danger. (Emphasis added.)

The Seventh Circuit's reasoning in the instant case is also inconsonant with *Kirsch* v. *United States*, 174 F. 2d 595 (8th Cir. 1949). Although in *Kirsch* the government introduced into evidence the bank's record of defendant's business checking account and deposit slips showing all deposits made to that account, the Court reversed the conviction after finding that the government had not sufficiently *analyzed* defendant's bank deposits. The Eight Circuit held in 174 F. 2d at 601:

> It is one thing for a party to say . . . that he had exercised all of the means he reasonably could to determine how much of a bank account was income, had eliminated all that he could determine was not income, and was therefore assuming for the purpose of calculating taxes due that the remainder was income, and quite another and different thing to say . . . as was done in this case—My evidence shows that all of these deposits were not income, but I do not know how much was not, I have made no effort to find out. So I am assuming that all are income and am casting the burden on the defendant to show, if he can, how much is not, or suffer the consequences. The latter procedure cannot be approved.

The Seventh Circuit's decision in the case at bar represents the first bank deposits prosecution in which an appellate court has approved the fundamental failure of the government to conduct any investigation and analysis of the deposits. It also appears to be the first time that the government was permitted to prove defendant's deposits by merely utilizing the figures shown on defendant's monthly bank statements and savings passbooks. Although the government identified and eliminated several obvious non-income items from the face of the passbooks, it is impossible to determine how many non-income items could have been eliminated from defendant's deposits had the government conducted the type of bank deposits investigation prescribed in the Internal Revenue Manual and performed in *United States* v. *Slutsky*, 487 F. 2d 832 (2nd Cir. 1973) and in *Beard* v. *United States*, 222 F. 2d 84 (4th Cir. 1955). As the First Circuit said in *Morse, supra*, 491 F. 2d at 154:

> The significance of the agent's allowing a non-income deduction is not the concession, but the corresponding implication that it should not be larger.

The record in the instant case contains numerous examples of loan repayments which were not credited to defendant as non-income items, and there is considerable testimony concerning the defendant's practice of cashing clients' checks, travelers' checks and employee payroll checks, all of which were deposited to petitioner's bank account. Since the government did not analyze the deposits, all of these items were considered taxable deposits of income.

The instant case is not only in conflict with the decisions of other circuits, it is actually a departure from the doctrine heretofore followed in the Seventh Circuit. In *United States* v. *Doyle*, 234 F. 2d 788 (7th Cir. 1956), the Court approved the use of the bank deposits method "if a thorough investigating analysis of the deposits is made as . . . is generally required." 234 F. 2d at 793. Now the Seventh Circuit, apparently by relying upon *United States* v. *Lacob*, 416 F. 2d 756 (7th Cir. 1969), has improperly adopted the "appearance of income" concept as a substitute for the requirement of an analysis of the deposits. *Lacob*, however, envisioned no such substitution. *After* defendant's bank deposits were analyzed in *Lacob*, the government identified over $55,000 as income and an additional $39,000 as having the appearance of income. The Court in *Lacob* found that "almost two-thirds of the income charged to defendant was, in fact, proved by the specific-item method." 416 F. 2d at 760. A thorough investigative analysis of the bank deposits thus remained a prerequisite to proof or receipts having the appearance of income.

Legal issues of exceptional importance have been raised in the instant petition and extraordinary circumstances exist which require an authoritative consideration and decision by this Honorable Court. In *Holland* v. *United States*, 348 U. S. 121, 99 L. Ed. 150, 75 S. Ct. 127 (1954), Mr. Justice Clark in 348 U. S. at 129 wrote:

> [P]itfalls inherent in the net worth method . . . require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. Cf. *Universal Camera Corp.* v. *N.L.R.B.* 340 U.S. 474, 489, 95 L.Ed 456, 468, 71 S.Ct. 456. Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute.
>
> * * * * *
>
> Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.

Petitioner respectfully suggests that in the case at bar the United States Court of Appeals for the Seventh Circuit did not exercise that "great care and restraint" that has been mandated by this Honorable Court. By abandoning the requirement for an adequate and full investigation and analysis of a defendant's

bank deposits in a case prosecuted exclusively under the bank deposits method, the Seventh Circuit rescinded the guarantee of essential accuracy in the circumstantial proof and transgressed from the rationale and the rules promulgated in *Holland*. The rules of law enunciated by the Seventh Circuit which:

1. permit the jury, without instructions, to determine whether defendant's deposits were capable of retrieval and analysis by the government,
2. permit the jury, without intructions, to rely upon defendant's unanalyzed monthly bank statements and savings passbooks as proof of deposits of income,
3. shift the burden of proof to defendant by requiring him to explain any discrepancy between the total deposits shown on his bank statements and the income reported on his tax return or suffer the legal inference that such discrepancy is unreported income, and
4. adopt the "appearance of income" rationale,

also violate *Holland* and, moreover, fail to comport with due process, fundamental fairness, or a sense of justice. These issues cogently warrant resolution by this Honorable Court.

All of the foregoing issues, particularly the departure from the requirement that the government must prove, as an element of its burden of establishing the guilt of the accused, that it has conducted an adequate and full investigation and analysis of defendant's bank deposits, places the Seventh Circuit in conflict with recent decisions from two other circuits: *United States* v. *Morse*, 491 F. 2d 149, 152 (1st Cir. 1974), and *United States* v. *Slutsky*, 487 F. 2d 832 (2nd Cir. 1973). This conflict in the circuits, being directed at the fundamental due process requirements for proceeding under the bank deposits method, merits resolution by this Honorable Court. It is time for the principles of *Holland* v. *United States, supra*, to be reaffirmed.

CONCLUSION.

For the reasons stated herein, petitioner respectfully urges this Honorable Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX

APPENDIX "A".

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 74-1997
UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

CHARLES A. ESSER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—No. 73 CR 851 JAMES B. PARSONS, *Judge*

ARGUED MAY 19, 1975—DECIDED AUGUST 12, 1975

Before CASTLE, *Senior Circuit Judge,* BAUER, *Circuit Judge,* and EAST, *Senior District Judge.**

BAUER, *Circuit Judge.* Appellant-defendant, Dr. Charles Esser, a veterinarian, was indicted on three counts of willful evasion of income taxes for the years 1967, 1968 and 1969 in violation of 26 U.S.C. § 7201.[1]

* The Honorable William G. East, Senior District Judge, District of Oregon, is sitting by designation.

1. 26 U. S. C. § 7201 states as follows:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payments thereof shall, in addition to other penalties provided by law, be guilty

I. WERE *MIRANDA* WARNINGS REQUIRED AT THE OUTSET OF THE INVESTIGATION?

In the latter part of 1969, Philip M. Smith was an auditor in the Field Audit Division of the Internal Revenue Service. On August 26, 1969 he called Dr. Esser to arrange a meeting at his animal hospital on September 4, 1969 for the purpose of examining his books and records relative to a tax audit for the year 1967. At that meeting he examined appellant's books and records for the tax years 1967-1968 and observed that the total deposits in Dr. Esser's bank accounts exceeded his stated income for the years 1967 and 1968 by approximately $57,000 in 1967 and $34,000 in 1968. When questioned about the discrepancy, defendant could think of no explanation for the excess deposits.

Some time between September 4, 1969 and October 1, 1969 Smith obtained from Special Agent George Stearn of the Internal Revenue Service, Intelligence Division, a list of prepared questions which he used in a subsequent interview of Dr. Esser on October 1, 1969. Although he had never used the form in a civil audit before, he was familiar with the nature of the questions which it contained and knew that the answers to those questions could bring to light any possible, reasonable explanation for the apparent discrepancies discovered on September 4. Smith stated that the information elicited from the use of the form could be utilized in a civil case, and noted that he would have asked most of the questions included in the questionnaire anyway, but employed it to make sure that he didn't forget anything. At the October 1 meeting Dr. Esser told Smith that he had on hand an amount of money acquired shooting dice in 1944 and 1945, but indicated that it was hidden, and its location would not be disclosed. Dr. Esser also stated at this time that the hidden amounts of money were not deposited in

of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs prosecution."

his bank accounts. At no time did Agent Smith advise defendant of his constitutional rights.

Smith first referred the case to the Intelligence Division on October 3, 1969, two days after the interview with Dr. Esser. He was not contacted by any member of the Intelligence Division of the Internal Revenue Service regarding a criminal tax fraud investigation of Dr. Esser at any time prior to that referral. He was first contacted by Special Agent Stewart J. Hoak of the Intelligence Division approximately two or three weeks after the initial referral.

Defendant claims that all evidence relating to Revenue Agent Smith's October 1, 1969 interview of defendant should be suppressed, because Smith did not give any *Miranda* warnings to defendant prior to that interview. That interview occurred prior to the referral of defendant's case to the Intelligence Division. The trial court denied defendant's motion to suppress. In our opinion the district judge was correct.

Under this Court's decision in *United States* v. *Dickerson*, 413 F.2d 1111, 1117 (7th Cir., 1969), *Miranda* warnings are only required in noncustodial tax investigations "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division." This was done in the instant case. The first contact with defendant after transfer of the case to the Intelligence Division was Special Agent Hoak's interview of defendant on November 21, 1969. At the inception of that interview, Hoak advised the defendant of his constitutional rights. Defendant does not challenge the sufficiency of these warnings.

Relying on a footnote in *United States* v. *Habig*, 412 F.2d 1108 (7th Cir. 1969) appellant suggests that since Agent Smith had some suspicion that a criminal fraud may have been involved he had for all purposes began the criminal investigation thus making *Miranda* warnings mandatory. We cannot agree since the record discloses no indication of unreasonable delay

or collusion between Smith and any Intelligence Agent. Consequently the motion was properly denied.

II. MUST THE GOVERNMENT PROVE THE EXACT DATE OF EACH OFFENSE ALLEGED IN THE INDICTMENT?

Count I of the indictment charged that on or about April 15, 1968, defendant willfully and knowingly attempted to evade income tax due for the year 1967, by filing a false income tax return. Count II of the indictment charged that on or about April 15, 1969, defendant wilfully and knowingly attempted to evade income tax due for the year 1968, by filing a false income tax return. Count III of the indictment charged that on or about April 15, 1970, defendant willfully and knowingly attempted to evade income taxes due for the year 1969, by filing a false income tax return. Accordingly defendant argues that since the offense charged in each count of the instant indictment is committed at the time the return is filed, and since each count of the indictment specifically charges the date on or about which defendant filed each return, the government must at least prove that each offense charged was committed on or about a date in close proximity to the date charged in the indictment, and on or about a date before the indictment was returned and within the statute of limitations.

With regard to this claim the defendant stipulated that he had filed the returns, and that the Internal Revenue Service had received them. Each of the returns showed on its face that it was dated in April of the year following the tax year, and defendant identified the returns as having been signed by him on the dates indicated. In the absence of any evidence to the contrary, the trial court concluded that the jury could properly infer that the returns were filed on or about the dates charged.

III. IN A BANK DEPOSITS THEORY CASE MUST THE GOVERNMENT INTRODUCE INTO EVIDENCE ALL OF DEFENDANT'S TRANSACTIONS IN THE DEPOSIT ACCOUNT?

Appellant argues that the trial court should have granted motions for judgment of acquittal based upon the government's failure to conduct a thorough examination and analysis of defendant's bank deposits. We do not accept appellant's argument and find that the trial judge had sufficient grounds for denial of the motion for acquittal.

I. R. S. Agent Hoak testified that deposit slips and underlying items of deposit are customarily introduced to demonstrate the natue of the deposits. However, in this instance it was virtually impossible to introduce the deposit slips due to their poor quality, unreliability and unavailability. The government introduced the bank statements and pass books as the most reliable evidence available. Though appellant attempted on cross-examination to establish that the slips and items were capable of retrieval, the question was left as one of fact for the jury.

Defendant argues also that the bank deposits theory requires an analysis of the bank deposit items themselves. He contends that the government's duty to specifically identify and analyze the defendant's deposit slips and the underlying items is mandated by the "bank deposits cases"; and that failure to do so is fatal to the government's case. On examination the authorities reveal no such duty.

These cases establish that the bank deposits theory requires the government to prove that the defendant was engaged in an income producing business and that regular deposits of funds having the appearance of income were in fact made to bank accounts during the course of business. *United States* v. *Lacob*, 416 F. 2d 756 (7th Cir. 1969); *United States* v. *Stein*, 437 F. 2d 775 (7th Cir. 1971); *United States* v. *Morse*, 491 F. 2d 149

(1st Cir. 1974). The total deposits figure serves as the starting point for further analysis of the taxpayer's accounts. The government must do everything that is reasonable and fair under the circumstances to identify any non-income transactions and deduct them from total deposits. Further, all proper deductions and credits must be subtracted. *United States* v. *Slutzky*, 487 F. 2d 832 (2nd Cir. 1973). However, the government's investigators are not obliged to track down every conceivable lead offered by the taxpayer to justfy the non-income designation of a particular item.

After the government proves that deposits having the appearance of income were made the defendant has the burden to explain as far as possible the deposits. With this done the jury is entitled to infer that the difference between the balance of deposited items and reported income constitutes unreported income.[2]

The record herein supports the conclusion that a full investigation of various transactions underlying defendant's deposits was conducted, and that all reasonable steps were taken to

2. At trial, the government introduced evidence, primarly in the form of bank statements, that defendant made bank deposits of $125,448.44 in 1967, $125,716.85 in 1968, and $155,189.34 in 1969. Excluding all other sources for these deposits and giving defendant credit for all business expenses claimed, defendant's net business profits far exceeded the amount shown in his return:

Year	Net Profits Per Government's Evidence	Net Profit Per Return
1967	$48,092.22	$ 6,873.28
1968	$48,913.31	$15,231.41
1969	$56,817.40	$34,595.43

The government also showed that substantial amounts of federal income tax were due on the unreported business profits.

The government explained in detail the method employed to analyze the defendant's bank deposits during the years in question. Total deposits were determined by examination of the defendant's bank statements. From that total, all interbank deposits, re-deposits of cash, proceeds of inheritance and gifts and all other non-taxable sources of income were deducted.

identify and deduct non-income items such as interbank transfers and repayment of loans. The evidence showed thtat defendant admitted to the agents that he deposited his business receipts into his bank accounts. Further, the bank statements introduced into evidence, particularly the statements from the business checking account, showed regular deposits having the appearance of business receipts. The record is replete with testimony regarding the determination and crediting of non-income items to the total deposits. In our opinion the evidence was more than sufficient to support the verdict below.

IV. DID THE TRIAL COURT ERR IN PERMITTING THE TESTIMONY OF A SUMMARY WITNESS?

Appellant seeks to attack the testimony of the government's summary witness predicated on the argument heretofore decided; that the deposits proof was insufficient. The nature of a summary witness' testimony requires that he draw conclusions from the evidence presented at trial. In the instant case the record shows that the summary witness relied only upon the evidence received during the trial and that he was available for full cross-examination. Consequently the evidence was properly admitted for the jury's consideration and the judge properly denied defendant's motion.

The use of a summary witness in a bank deposits case was recently reaffirmed by this Court in *United States* v. *Stein, supra.* Summary testimony does not allow the witness to invade the province of the jury as defendant argues. In *United States* v. *Doyle*, 234 F. 2d 788 (7th Cir. 1965), the need for and validity of a summary testimony was upheld, so long as:

> "The sources from which the figures were obtained and the calculations prepared were in evidence [and the defendant could enjoy] ample opportunity to cross-examine the auditor fully as to all of those details and as to the evidentiary sources from whence they came" 234 F. 2d at 794.

In short, the government proved by clear, reliable evidence that defendant had enormous bank deposits and that after deducting all non-income sources of deposits, the business receipts far exceeded the amounts shown on his income tax retruns. This evidence was more than sufficient to support the jury verdict below.

V. DID THE GOVERNMENT PRESENT SUFFICIENT EVIDENCE TO SHOW THAT DEFENDANT WILLFULLY ENGAGED IN CRIMINAL CONDUCT?

Appellant's argument that the government failed to prove an essential part of the charge, i.e., willfulness, lacks merit. Admittedly there was no evidence in this case of the classic indicia of fraud, e.g., duplicate books and hidden accounts. The government however did in our opinion present evidence sufficient to allow the jury to find that defendant engaged in a pattern of understating income for three consecutive years.

Willfulness may be inferred from conduct which would have the effect of misleading or concealing such as a continual pattern of under-reporting income. See *Spies* v. *United States*, 317 U. S. 492 (1942); *Holland* v. *United States*, 348 U. S. 121 (1954); *United States* v. *Bishop*, 412 U. S. 356 (1973). Defendant argues that there must be some type of independent evidence, i.e., dual bookkeeping, secret accounts, testimony as to intent, to prove willfullness and that it cannot be inferred from the defendant's conduct. In general we agree that in almost every case there must be some independent evidence to corroborate the willful intent that is either inferred or shown by the defendant's actions. However, in a case such as this wherein the facts demonstrate a clear intent to mislead over a period of years, where the evidence is overwhelming, we think the jury could reasonably infer that the defendant's actions were willful.

VI. WAS THE GOVERNMENT'S SURVEY MATERIAL THAT TYPE WHICH MUST BE DISCLOSED UNDER BRADY V. MARYLAND?

Appellant's argument regarding the survey of defendant's customers can be broken down into three separate claims. The first is that governmental counsel misrepresented the nature of the evidence at the pre-trial conferences which took place on or about July 1, 1974. The second is that the defendant was prejudiced because the government failed to produce xeroxed copies of the customer's responses to the survey. The third is that the government's reference to the survey in closing argument was improper because it was not in evidence.

Defendant claims that government counsel misrepresented the results of the Internal Revenue Service customer survey by stating that it showed insignificant discrepancies between actual receipts and reported receipts. On January 23, 1974 the government filed its statement of compliance with Rule 2.04 listing the documents turned over to the defense. The survey was not turned over, and the government explicitly represented that "it has no material that fits within the scope of Local Rule 2.04(a) 2-6. The government did not turn over the results of the survey because it was its opinion that the material was not favorable to the defense. This opinion was borne out at trial in our hindsight view

On March 15, 1974 the government made clear in open court that the survey was originally conducted with a specific items case in mind, but that it had been discarded when the proof evolved into a bank deposits case. The government pointed out that it had no intention of using the survey at trial. Further it was stated that the information contained in the survey would be considered 3500 material if the authors of the responses were ever to take the stand. The implication of this was again clear: the survey was not *Brady* material and thus was not exculpatory to the defendant. These representations were made in response to

a motion for discovery by defendant's then attorney, Mr. Warren L. Schmidt. They were a matter of record when defendant's trial attorneys came into the case. In addition, Mr. Schmidt had told trial counsel about the survey and was present at trial.

At the conferences which occurred on or about July 1, 1974, Assistant United States Attorney Nash stated for the second time that the government did not intend to use the survey evidence at trial because it was insignificant to the presentation of the bank deposits case, and because the survey itself would have constituted inadmissible hearsay. Counsel for the defendant understood him to say that the discrepancies which were revealed by the survey were insignificant, an apparent misunderstanding which they imply led to their conclusion that the survey was in fact favorable to the defendant, thus accounting for its elicitation from Agent Hoak on cross-examination.

The defense did not demand that the government turn over the material under *Brady* or, alternatively, subpoena the survey for use in its case in chief. Instead, defendant's counsel chose to elicit the damaging testimony on cross-examination of one of the government's primary witnesses. The only conceivable explanation for this tactic is that counsel made an unfortunate mistake in not apprising himself of the precise nature of the survey results before eliciting it on his client's behalf. However, the government cannot be held responsible for a defense tactic which happens to strengthen the prosecution's case.

Defendant claims that the government failed to provide photo copies of the written responses to the survey. However the record and the supplementary affidavits establish that the survey was tendered and ultimately turned over to the defendant.

At the time the results of the survey were disclosed by Agent Hoak on cross-examination, the government indicated that defendant was welcome to the survey and agreed to produce it in court. At this time counsel for the defendant did not specifically request that the information be turned over.

On the following day of trial, October 18, the government appeared in court with the summary and the letter responses upon which the summary was based. Defendant objected to the government's attempt to introduce this evidence by re-opening the direct examination of Agent Hoak. At this time the government again explained that it had had no intention of using this survey in the presentation of its case, but felt obliged to produce it to offset the adverse inferences which defendant had raised concerning its absence. The court ruled that the government could introduce the survey on rebuttal. Ultimately, however, neither the survey nor the patient responses were introduced into evidence by either of the parties.

In the afternoon of the same day, October 18, defendant's counsel made a "demand" for the survey in court. Counsel for the government indicated that the survey was being copied and would be provided to defendant as promptly as possible. The court suggested at this time that the details of the turnovers be concluded privately by the parties. At an informal meeting which took place outside the courtroom later in the day, the government counsel came away with the impression that defense counsel indicated that he would be satisfied with the summary itself since the information contained in it would simply be duplicative of the information contained in the customer responses. However, counsel denies making this representation in his affidavit. In the evening of the same day, October 18, counsel for the government met with the defendant's attorneys in the reception room of the United States Attorney's Office, where photo copies of the 25 page summary were turned over to the defense.

On Sunday, October 20, defense counsel called Mr. Nash and requested the 450 letter responses. Mr. Nash indicated that it would be impossible to get reproduction of these responses completed on Sunday but that he would attempt to get them copied on Monday. During the course of the next week defense counsel inquired on three occasions outside the courtroom whether the government had had the opportunity to complete the copying

process. Mr. Nash indicated that the process was 95% completed and that counsel could pick them up at any time. The copies were not picked up.

The survey was not mentioned or referred to in open court during the entire week of October 21, until late Friday, October 25, during the presentation of motions at the close of all testimony. At that time defense counsel called the court's attention to the fact that the letter responses had not yet been turned over although receipt of the summary itself was acknowledged. The court observed that since the requests for "summary" or "survey" may well have been confused there was no indication that the government was withholding anything intentionally from the defense. The defense did not request that the court order production of the responses at this time, nor had it made such a request for a formal order at any other time during the trial.

It is apparent that all reasonable attempts were made to accommodate the defendant in his less than urgent requests for the survey data. If for some reason undisclosed in this record defendant indeed desired the copies, he could have formally requested an order from the court prior to the close of testimony. His failure to do so gives rise to a strong inference that defendant's "need" for these items was an afterthought.

Defendant's third claim with regard to the survey is that the government's reference to it during the course of closing argument was improper because the survey was not in evidence. The facts do not support this claim. In its closing argument the government restricted its observations to the defendant's opening statement and to the cross-examination testimony of Special Agent Stewart Hoak.

In his opening statement defendant's counsel referred to the survey when he represented to the jury that his cross-examination of Agent Hoak would destroy any government attempt to prove a specific item of unreported income. The subject was thus opened up in the first moments of trial. Subsequently, the defense

forced Agent Hoak to testify on cross-examination at some length concerning the nature of the survey results. The subject was thus placed into evidence. The remarks of counsel were before the jury and the testimony of Hoak was in evidence, and it was to those statements that the evidence alone that the government responded in closing argument. Government counsel carefully prefaced his references to the survey results by pointing out that they were based entirely on what "Agent Hoak said", and carefully limited his remarks to the evidence already adduced. He did not go beyond that testimony.

Finally, it should be noted that this was not a close case. The unexpected survey testimony certainly did not help the defense, but even without it the evidence was overwhelming that the defendant committed the offense charged. The discrepancies were large, they took place over a period of years, and the defendant failed to explain them. Defense counsel in this case made a tactical decision which did not detract nor contribute to the outcome of the case to any great degree. On this issue at the very most there was a misunderstanding here. The government could not breach its obligations with regard to the survey, when it had no such obligations. Consequently, in our opinion, the trial judge decided the question properly.

VII. DID THE TRIAL COURT ERR IN REFUSING THE DEFENDANT'S INSTRUCTION REGARDING BANK DEPOSITS?

Defendant contends that the district court erred in not giving his requested Instruction No. 17 which read:

> "The bare fact standing alone, that a man has deposited sums of money in a bank does not prove that he owed income tax on those amounts."

The instruction was refused because the court determined at the instruction conference that it did not accurately reflect the theory of the defense as claimed. In response, counsel stated that his

theory of defense was that cash earned, received or accumulated prior to the tax years in question was not income attributable to those years. With some modification, the court drafted and gave an instruction to this effect, in spite of the court's observation that the defendant had failed to put in any evidence of cash received in prior years.

In view of counsel's own statement regarding the nature of his defense, and the "loan repayment" evidence which he introduced, it is apparent that Instruction No. 17 would have been misleading to the jury if given. In the present case, the government had established substantially more than "deposited sums of money standing alone". Furthermore, the defendant's case as presented did not support his claim to the court that the refused instruction embodied defendant's "most elemental and essential theory of defense." The instruction was properly denied.

Accordingly it is the decision of this Court that the conviction should be affirmed.

AFFIRMED.

APPENDIX "B".

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 12, 1976.

Before

HON. LATHAM CASTLE, SR. *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. WILLIAM G. EAST, SR. *District Judge**

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CHARLES A. ESSER, *Defendant-Appellant.*	Appeal from the United States District Court for Northern District of Illinois, Eastern Division. (73 Cr 851)

No. 74-1997

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

* Sr. District Judge William G. East of the District of Oregon is sitting by designation.

APPENDIX "C".

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA	No. 73 CR 851
vs.	Violation: Title 26, United States Code, Section 7201.
CHARLES A. ESSER	

The November 1973 Grand Jury charges:

On or about April 15, 1968, in the Northern District of Illinois, Eastern Division, Charles A. Esser defendant herein, a resident of Mount Prospect, Illinois, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1967, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Chicago, Chicago, Illinois, a false and fraudulent income tax return on behalf of himself, where it was stated that his taxable income for said calendar year was $12,593.51 and that the tax due and owing thereon was the sum of $2,982.99, whereas he then and there well knew his income for the year was the sum of $63,445.71 upon which said taxable income there was owing to the United States of America an income tax of $29,441.05;

In violation of Title 26, United States Code, Section 7201.

Count Two.

The November 1973 Grand Jury further charges that:

On or about April 15, 1969, in the Northern District of Illinois, Eastern Division, Charles A. Esser defendant herein, a resident of Mount Prospect, Illinois, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America, for the calendar year 1968, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Chicago, Chicago, Illinois a false and fraudulent income tax return on behalf of himself, wherein it was stated that his taxable income for said calendar year was $17,462.90 and that the tax due and owing thereon was the sum of $5,399.69, whereas he then and there well knew his income for the year was the sum of $51,872.41 upon which said taxable income there was owing to the United States of America an income tax of $25,208.45;

In violation of Title 26, United States Code, Section 7201.

Count Three.

The November 1973 Grand Jury further charges that:

On or about April 15, 1970, in the Northern District of Illinois, Eastern Division, Charles A. Esser defendant herein, a resident of Mount Prospect, Illinois did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America, for the calendar year 1969, by preparing and causing to be prepared, by signing and causing to be signed and by mailing and causing to be mailed, in the Northern District of Illinois, Eastern Division, a false and fraudulent income tax return on behalf of himself, which was filed with the Internal Revenue Service, wherein it was stated that his taxable income for said calendar year was $42,541.19 and that the tax due and owing thereon

was the sum of $19,466.60, whereas he then and there well knew his income for the year was the sum of $66,003.08 upon which said taxable income there was owing to the United States of America an income tax of $35,927.28;

In violation of Title 26, United States Code, Section 7201.

A TRUE BILL:

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Foreman.

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United States Attorney